No. 76-384

In the Supreme Court of the United States

OCTOBER TERM, 1976

VERNON SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1976. The petition for a writ of certiorari was filed on September 14, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court committed reversible error in admitting hearsay testimony during the rebuttal of petitioner's claim of entrapment.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing heroin with intent to distribute it (Count I), and of distributing it (Count II), in violation of 21 U.S.C. 841(a)(1). He was sentenced to six years' imprisonment on Count I and three years' imprisonment on Count II, the sentences to be served concurrently, and to five years' special parole. The court of appeals affirmed (Pet. App.).

On August 29, 1975, Barbara Sims, a Miami, Florida, police officer, and Clarence Lydes, an informant, went to petitioner's business establishment (a Miami day-care center) to purchase heroin (Tr. 13, 164). Petitioner inquired what kind of heroin they wanted and told them to meet him later at his house (Tr. 18, 165). At his house petitioner showed them a quantity of heroin and offered to sell it to them for $1,600 (Tr. 21-22, 171). Petitioner stated that the heroin was of good quality and could be ground up in a blender and diluted (Tr. 23-24). Sims told petitioner that she and Lydes had only $1,500, and ultimately petitioner sold the heroin to them for $1,400 (Tr. 21-23, 171-172).

Petitioner testified in his defense, stating that he had been entrapped by informant Lydes. On the day of the sale, according to petitioner, Lydes visited the day-care center alone and asked petitioner to pretend to sell to him heroin that Lydes already possessed (Tr. 60). Petitioner testified that Lydes told him that he had squandered money given him by his girlfriend to purchase heroin (*ibid.*): apparently the proposed fake sale to Lydes of heroin that he already possessed was to take place in the girlfriend's presence and somehow conceal from her Lyde's alleged misuse of her money.

In any event, petitioner testified that he refused to go along with the "hoax," but that Lydes—accompanied by his girlfriend (Officer Sims)—came to his house later the same day and again sought petitioner's help (Tr. 66). At this point, according to petitioner, he acquiesced and became a reluctant participant. Lydes surreptitiously passed him the heroin, then "purchased" it for $1,400, and then surreptitiously repocketed the money (Tr. 68-72). Throughout the transaction, petitioner testified, Lydes repeatedly kicked petitioner on the foot as if to encourage petitioner's participation in the "hoax" (Tr. 68, 69, 70). Petitioner also testified that Lydes inquired whether the heroin could be diluted, whereupon petitioner "got a blender" and "found some lactose" and diluted the heroin (Tr. 69). Finally, petitioner testified that he had previously been involved in possessing and selling the narcotics with Lydes, but that he stopped dealing with Lydes because he was not making a profit (Tr. 73-74).

Lydes testified on rebuttal that on the day of the sale he and Officer Sims went to the day-care center together and that in Sims' presence he told petitioner that they wanted to purchase heroin (Tr. 164-165). Lydes also testified that on petitioner's instruction he and Sims went to petitioner's house (Tr. 165, 168), where petitioner sold them the heroin (Tr. 170-173).

Another rebuttal witness, undercover Officer Kirlay, testified that only two days before the sale in question he had sought to buy heroin from Lonnie Brookins, who said that he would have to go to petitioner's house to obtain it (Tr. 135). Officer Kirlay further testified that Brookins, after making several trips to petitioner's house, sold him 25 bags of heroin (Tr. 135-138). Officer Kenneth Lyles testified that he observed Brookins make several trips to petitioner's house (Tr. 148) and confirmed that Officer Kirlay thereafter purchased heroin from Brookins (Tr. 150).

ARGUMENT

Petitioner contends that his conviction should be reversed because Officer Kirlay's testimony contained a hearsay statement by Brookins.

This Court long ago established that "if the defendant seeks acquittal by reason of entrapment he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue." *Sorrells* v. *United States*, 287 U.S. 435, 451. See also *United States* v. *Russell*, 411 U.S. 423, 429. In the Fifth Circuit, that inquiry may include hearsay evidence that would be inadmissible for other purposes. *E.g.*, *United States* v. *Dickens*, 524 F. 2d 441 (C.A. 5), certiorari denied *sub nom. Glenos* v. *United States*, 425 U.S. 994. Other courts of appeals, as petitioner correctly notes (Pet. 5), have ruled that otherwise inadmissible hearsay evidence does not become admissible because introduced to show predisposition.[1] This case, however, does not afford a suitable occasion to resolve the conflict among the circuits to which petitioner alludes.

In the first place, as is clear from the rather comprehensive survey of the question in *United States* v. *McClain*, 531 F. 2d 431, 435-438 (C.A. 9), certiorari denied October 4, 1976, No. 75-6389, the conflict centers upon a kind of hearsay evidence—statements by extra-judicial declarants about the general reputation of the defendant say complained of by petitioner. The prosecution's rebuttal of petitioner's entrapment defense included only one piece of hearsay—Officer Kirlay's testimony that

[1]In addition to the cases cited by petitioner (except for *Hansford* v. *United States*, 303 F. 2d 219 (C.A. D.C.), which did not involve hearsay), see *United States* v. *McClain*, 531 F. 2d 431 (C.A. 9), certiorari denied October 4, 1976, No. 75-6389 (holding the admission of hearsay evidence harmless error).

for drug dealing--that is quite
different from the hear-

Brookins had stated that he would have to go to petitioner's house to get heroin. This was not hearsay regarding petitioner's general reputation, but rather an expression of Brookins' future intention or plan (amply corroborated by the non-hearsay evidence that Brookins did go to petitioner's house and did thereafter sell heroin to Officer Kirlay). As such, it was admissible as an exception to the hearsay proscription (see Fed. R. Evid. 803(3)), whether used to rebut the claim of entrapment or for any other purpose.

Moreover, even if the testimony regarding Brookins' statement were inadmissible, any error was plainly harmless in the circumstances of this case. Brookins' statement that he was going to petitioner's house to get heroin was merely cumulative of the non-hearsay evidence that Brookins sold heroin to Officer Kirlay only after—and immediately after—he in fact went to petitioner's house. Furthermore, petitioner's own testimony that he had previously engaged in heroin transactions with Lydes, and that he had lactose in his house with which to dilute the heroin, was sufficent evidence to support the court's finding of predisposition beyond a reasonable doubt, wholly apart from the hearsay statement of Brookins that he was going to petitioner's house to get heroin.

Finally, this was a trial to the court, not a jury—a relevant consideration to a determination of prejudicial error. *United States* v. *Empire Packing Co.*, 174 F. 2d 16, 20 (C.A. 7), certiorari denied, 337 U.S. 959. That court found Officer Sims' testimony highly credible—"that she was telling the truth"—and that the government had proved beyond a reasonable doubt that petitioner was not entrapped (Tr. 241, 242). Further review is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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